STATE OF MICHIGAN

COURT OF APPEALS

CHERYL DELYN GOVITZ f/k/a CHERYL DELYN MUMA, Plaintiff-Appellant,	UNPUBLISHED June 6, 2013
v	No. 312982 Gladwin Circuit Court
JOSEPH DELL MUMA, Defendant-Appellee.	LC No. 09-004502-DM

Before: BECKERING, P.J., and METER and RIORDAN, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order changing physical custody of the parties' son from plaintiff to defendant. We affirm.

On June 23, 2010, the trial court entered a judgment of divorce that awarded plaintiff sole physical custody of the parties' son and daughter.[1] The judgment of divorce also suspended defendant's parenting time with the children pending approval of parenting time by a psychologist and the Friend of the Court. In August 2011, the trial court granted defendant limited parenting time with the parties' son. Unfortunately, the child's academic performance declined about this time, and he had multiple school absences in the first semester of the 2011/2012 school year. On February 1, 2012, the trial court expanded defendant's parenting time to two of every three weekends, with defendant having responsibility for the child's school attendance on the following Mondays.

The child's problems with school attendance continued to escalate, and the child failed to attend school on a regular basis in the second semester of the 2011/2012 school year. The child was consequently charged with truancy in the Gladwin Probate Court, and he successfully attended 2012 summer school.[2] On April 25, 2012, defendant moved for a change of custody,

[1] The parties' daughter turned 18 years old during these proceedings and is not involved in this appeal.

[2] Plaintiff attributes the child's success in 2012 summer school to prescription medications for anxiety that he had begun taking. Defendant disputes that anxiety was the reason for the school

which the trial court granted on October 10, 2012, after a de novo hearing that took place on September 4, 2012.

On appeal, plaintiff first argues that the trial court erred in finding that defendant showed a "change of circumstances" warranting reconsideration of the original custody order. We disagree. We review a trial court's finding that a change of circumstances existed under the "great weight of the evidence" standard. *Mitchell v Mitchell*, 296 Mich App 513, 519; 823 NW2d 153 (2012). A finding of fact is against the great weight of the evidence when "the evidence clearly preponderates in the opposite direction." See, e.g., *Berger v Berger*, 277 Mich App 700, 705; 747 NW2d 336 (2008).

To obtain a change in custody, a party must first show "proper cause" or a "change of circumstances" by a preponderance of the evidence. *Vodvarka v Grasmeyer*, 259 Mich App 499, 508-509; 675 NW2d 847 (2003). "[P]roper cause means one or more appropriate grounds that have or could have a significant effect on the child's life to the extent that a reevaluation of the child's custodial situation should be undertaken." *Id*. at 511. A trial court should determine whether "proper cause" exists by examining the best-interests factors contained in MCL 722.23. *Vodvarka*, 259 Mich App at 511-512. "[T]o establish a 'change of circumstances,' a movant must prove that, since the entry of the last custody order, the conditions surrounding custody of the child, which have or could have a *significant* effect on the child's well-being, have materially changed." *Id*. at 513 (emphasis in original). The changes necessary for a "change of circumstances" must be "material" and beyond the "normal life changes . . . that occur during the life of a child[.]" *Id*. As with a determination of "proper cause," a trial court should determine whether a "change of circumstances" exists by examining the best-interests factors contained in MCL 722.23. *Vodvarka*, 259 Mich App at 514.

The trial court found that a change of circumstances existed for two reasons. First, the court opined that defendant had persistently attempted to pursue parenting time and plaintiff had repeatedly attempted to obstruct his parenting time. Second, the court found that the child had an escalating problem with school attendance until 2012 summer school.

With respect to the first reason, we agree with plaintiff that the trial court erred in determining that defendant's attempts to pursue parenting time indicated a "change of circumstances."[3] As noted, the phrase "change of circumstances" refers to a material change, beyond a normal life change, that has or could have a significant effect on the child's well-being. *Id*. at 513-514. Defendant's persistent attempts to pursue parenting time and the legal proceedings associated with them were not a "change of circumstances" in the child's life. While the trial court reasonably observed that defendant's attempts indicated that defendant was concerned for the child and wanted him to succeed academically, it is unclear, on the record before us, how these attempts constituted a "change of circumstances" as defined by case law. It

absences and appears to contend that the summer-school compliance resulted from the threat of being placed in juvenile detention.

[3] We note that we are evaluating this issue under the "change of circumstances" scenario and not the "proper cause" scenario because the trial court explicitly cited the "change of circumstances" prong for allowing a reevaluation of custody.

seems that the court, in citing this factor, was focusing more on defendant than on the child. Moreover, to the extent that the trial court found a "change of circumstances" because of plaintiff's purported efforts to obstruct defendant's parenting time, we note that "[d]isputes regarding visitation . . . are not a proper basis for changing custody." *Adams v Adams*, 100 Mich App 1, 13; 298 NW2d 871 (1980).

With respect to the second reason, it is relatively straightforward that the child's poor school attendance after the June 23, 2010, custody order was a significant, "material" change beyond a "normal" life change for a child. *Vodvarka*, 259 Mich App at 513. On this point, the trial court implicitly found that the child successfully influenced plaintiff to avoid attending school and that defendant would be less susceptible to the child's influence if awarded custody. This reasoning is supported by the facts that the child would often stay home and play video games instead of going to school while in plaintiff's custody and, at the time of a May 8, 2012, hearing, the child's only day of school attendance since a February 1, 2012, parenting-time order occurred on the Monday after defendant's only weekend parenting time with the child during that period. The February 1 order specifically stated that defendant "shall see to [the child's] attendance at school on Mondays of his parenting time weekends." Evidently the child claimed to be ill that day and wanted to come home, but defendant did get the child to attend school that day. Further, even assuming that the child's improved 2012 summer-school attendance was attributable to a threat of detention and not to parental influences, it was possible that the threat of detention could have ended before the child completed high school. Thus, the child's school attendance would again correspond to his home environment.[4] It follows, therefore, that the child's failure to attend school was a change of circumstances that warranted reconsideration of the custody order.

Accordingly, we affirm the trial court's finding that a change of circumstances existed solely on the basis of the second reason identified by the trial court. Although the first reason identified by the trial court was erroneous, this error was harmless because a fair review of the entire opinion indicates that the trial court's predominant concern was the child's school attendance.

Next, plaintiff argues that the trial court erred in applying best-interests factors (d), (h), (j), and (l) as reflected in MCL 722.23. We disagree. A trial court's findings of fact with respect to the statutory best-interests factors are reviewed under the "great weight of the evidence" standard, while a trial court's discretionary ruling to award custody to a certain party is reviewed for an abuse of discretion. See *Berger*, 277 Mich App at 705. A finding of fact is against the great weight of the evidence when "the evidence clearly preponderates in the opposite direction." See *id*. In child-custody cases, "[a]n abuse of discretion exists when the trial court's decision is so palpably and grossly violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias." *Id*.

[4] In addition, to the extent medication may have been a factor in increased school attendance, the facts remain that the child missed a tremendous number of school days in plaintiff's custody and that defendant demonstrated a greater willingness and desire to increase school attendance.

Once a trial court determines that a moving party has shown proper cause or a change of circumstances, the trial court must next consider whether the child has an "established custodial environment . . . ." *Dailey v Kloenhamer*, 291 Mich App 660, 666-667; 811 NW2d 501 (2011). If the child has an established custodial environment with one parent and the proposed custody modification would change this established custodial environment, the moving party must prove by clear and convincing evidence that custody modification is in the child's best interests. *Id*. at 667. To determine the child's best interests, the trial court must consider the best-interests factors reflected in MCL 722.23. *Dailey*, 291 Mich App at 667.

The trial court found that the child had an established custodial environment with plaintiff, so defendant was required to prove by clear and convincing evidence that custody modification was in the child's best interests under MCL 722.23. MCL 722.23 reads, in relevant part:

> As used in this act, "best interests of the child" means the sum total of the following factors to be considered, evaluated, and determined by the court:
>
> * * *
>
> (d) The length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity.
>
> * * *
>
> (h) The home, school, and community record of the child.
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> * * *
>
> (j) The willingness and ability of each of the parties to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent or the child and the parents.
>
> * * *
>
> (l) Any other factor considered by the court to be relevant to a particular child custody dispute.

The trial court did not err with respect to factor (d). The testimony at the de novo hearing showed that the child regularly missed school and instead played video games in the months before the trial court's decision on custody. This is not a "satisfactory" environment for a child, and there is no "desirability" in maintaining such an environment. To the contrary, the evidence that plaintiff enabled and allowed school absences for an extended period and that defendant was extremely concerned about school attendance and had demonstrated at least some ability to enforce attendance indicated that factor (d) favored defendant. Although plaintiff argues that the trial court's finding with respect to factor (d) was erroneous because no parental alienation occurred, the alleged parental alienation was irrelevant with respect to factor (d), and the trial court did not discuss parental alienation with respect to factor (d).

The trial court also did not err with respect to factor (h). As the trial court observed, the child's failure to attend school on a regular basis, coupled with his near-failing grades, clearly reflected a poor school record. In addition, as noted earlier, at the time of a May 8, 2012, hearing, the child's only day of school attendance since a February 1, 2012, parenting-time order occurred on the Monday after defendant's only weekend parenting time with the child during that period. Again, the February 1 order specifically stated that defendant "shall see to [the child's] attendance at school on Mondays of his parenting time weekends." The child claimed illness that day but defendant got him to attend school. This suggested that the child's school record could improve in defendant's custody. The record reflects that the child missed a tremendous number of school days while in plaintiff's custody, and defendant testified that he wanted physical custody "to make sure [the child] attends school and has a chance at graduating . . . ." It was not against the great weight of the evidence for the trial court to find that plaintiff had been too "enabling" of the child's school absences and that factor (h) favored defendant.

In addition, the trial court did not err with respect to factor (j). As the trial court implied near the end of its opinion, plaintiff allowed the child to decide whether he would attend parenting time with defendant. When a parent refuses to require a child to attend parenting time with the other parent, it is reasonable to infer that the parent has not properly encouraged the parent-child relationship as referred to in factor (j). See *Hilliard v Schmidt*, 231 Mich App 316, 325; 586 NW2d 263 (1998), abrogated in part on other grounds by *Molloy v Molloy*, 247 Mich App 348; 637 NW2d 803 (2001), aff'd in part and vacated in part 466 Mich 852 (2002).

Plaintiff argues that the trial court disregarded the psychologist reports indicating that she was not responsible for parental alienation. It is true that plaintiff submitted reports indicating the absence of parental alienation, while defendant did not submit any reports indicating the presence of parental alienation. However, the trial court has the discretion to weigh the credibility of the evidence and witness testimony. See *MacIntyre v MacIntyre* (*On Remand*), 267 Mich App 449, 459; 705 NW2d 144 (2005).

Finally, although the trial court could have disregarded factor (l) because its concerns with the child's school attendance were addressed in factors (d) and (h), this Court has noted that "the factors have some natural overlap." *Fletcher v Fletcher*, 229 Mich App 19, 25; 581 NW2d 11 (1998). The trial court reasonably observed that the child's home environment and corresponding lack of school attendance was such a serious problem that it could not be confined to one factor. For this reason, the trial court did not err in considering the child's school attendance in connection with factor (l).[5]

[5] We note that plaintiff focuses on the findings concerning the individual factors and does not make a separate appellate argument regarding the ultimate custody decision that was based on those factors. At any rate, we find no abuse of discretion with regard to the ultimate decision.

Affirmed.

/s/ Jane M. Beckering
/s/ Patrick M. Meter
/s/ Michael J. Riordan